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as meaning those persons entitled to take under the statute of descents regarded in law as nearest heirs, and hence the state should be divided among the brother, nieces, etc.

[Ed. Note.—For other definitions, see Words and Phrases, Nearest Heirs.]

Appeal from Circuit Court, Southampton County.

Bill by E. D. Kello against the executors of John G. Kello, deceased, and others. From a decree directing the executors to divide the residuary estate into parts and to give only one to complainant, he appeals. Affirmed.

Jno. N. Sebrell, Jr., of Norfolk, for appellant.

Jas. H. Corbitt, of Suffolk, and *Jas. T. Gillette*, of Courtland, for appellees.

LATHAM *v.* POWELL.

June 10, 1920.

[103 S. E. 638.]

1. Sales (§ 179 (5)*)—Caveat Emptor Does Not Require Buyer of Cattle at Specified Weight Per Pound to Examine Aggregate Weight.—Purchaser of cattle at specified price per pound on board cars at shipping points did not, by acceptance of cattle delivered, assent to the weight thereof as claimed by seller, under the maxim of caveat emptor, in absence of a showing of conduct on the part of purchaser whereby he waived his right to question the accuracy of the aggregate weight charged against him; the maxim not applying in such case.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 26.]

2. Sales (§ 167*)—Maxim of Caveat Emptor Applicable to Executory Contracts by Description.—The maxim caveat emptor applies, so far as quality is concerned, as well to executory contracts of sale of chattels by description as to present sales of specific chattels, where in the absence of fraud there has been an acceptance of the subject to the sale.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 10, et seq.]

3. Sales (§ 269*)—Maxim of Caveat Emptor Inapplicable, Where There Is Express or Implied Warranty.—The maxim of caveat emptor does not apply where there is an express warranty, or where there is a warranty implied from the nature and circumstances of the case.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 659.]

4. Sales (§ 273 (3)*)—Seller Held to Have Impliedly Warranted Quality of Cattle.—Where buyer of cattle informed seller that he was buying the cattle to supply his trade, and that it was necessary that the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

cattle for such purpose be of a certain weight there was an implied warranty that the cattle would be reasonably fit for the purpose of supplying buyer's trade, and be of the weight specified.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 660.]

Sales (§ 269*)—Maxim of Caveat Emptor Inapplicable to Sale of Cattle Under Implied Warranty as to Quality.—Purchaser of cattle under implied warranty as to fitness of cattle for purpose of supplying purchaser's trade was under no obligation to examine the goods and determine conclusively whether cattle corresponded to the warranty; the rule of caveat emptor not applying.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 660.]

6. Sales (§ 288 (2)*)—Buyer's Unexplained Acceptance of Goods Sold Under Implied Warranty Evidence of Satisfaction.—Buyer's unexplained acceptance of goods, sold under an implied warranty may be strong evidence of satisfaction, but it is not conclusive, and may be rebutted by circumstances.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 38.]

7. Sales (§ 288 (2)*)—Buyer's Acceptance of Cattle Held Not a Waiver of Rights under Implied Contract.—Buyer of cattle did not, by acceptance of cattle, waive his rights under an implied warranty to quality, where, immediately after coming into possession of cattle and after inspecting them, he wired seller that cattle were not as represented, and that seller should come and help sell them.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 38.]

8. Damages (§ 210 (4)*)—Instruction Directing Verdict for Interest on Balance of Price from Delivery Error.—In seller's action for balance of purchase price, where defense was shortage of weight from that charged against buyer and breach of implied warranty, instruction, directing jury, on its finding for seller, to award interest from date of delivery, held error.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 280.]

9. Appeal and Error (§ 1175 (5)*)—Case Remanded Where Facts Not Sufficient for Appellate Court to Render Judgment.—Under Code 1919, § 6365, the case will be remanded by court on writ of error if the facts before the court are not sufficient for it to render judgment.

Error to Circuit Court, Prince William County.

Action by Reuben A. Powell against T. Otis Latham. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

R. A. Hutchison and *H. Thornton Davies*, both of Manassas, for plaintiff in error.

E. E. Garrett, of Leesburg, and *Thos. H. Lion*, of Manassas, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.